

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: SportsDirect.com Retail Limited

Of: Unit A, Brook Park East, Shirebrook NG20 8RY

1. The Information Commissioner ("the Commissioner") has decided to issue SportsDirect.com Retail Limited ("SportsDirect") with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA"). The penalty is in relation to a serious contravention of Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR").
2. This notice explains the Commissioner's decision.

Legal framework

3. SportsDirect, whose registered office address is given above (Companies House Registration Number: 03406347) is the organisation stated in this notice to have transmitted unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.
4. Regulation 22 of PECR states:

- "(1) This regulation applies to the transmission of unsolicited communications by means of electronic mail to individual subscribers.*
- (2) Except in the circumstances referred to in paragraph (3), a person shall neither transmit, nor instigate the transmission of, unsolicited communications for the purposes of direct marketing by means of electronic mail unless the recipient of the electronic mail has previously notified the sender that he consents for the time being to such communications being sent by, or at the instigation of, the sender.*
- (3) A person may send or instigate the sending of electronic mail for the purposes of direct marketing where—*
- (a) that person has obtained the contact details of the recipient of that electronic mail in the course of the sale or negotiations for the sale of a product or service to that recipient;*
 - (b) the direct marketing is in respect of that person's similar products and services only; and*
 - (c) the recipient has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of his contact details for the purposes of such direct marketing, at the time that the details were initially collected, and, where he did not initially refuse the use of the details, at the time of each subsequent communication.*
- (4) A subscriber shall not permit his line to be used in contravention of paragraph (2)."*

5. Section 122(5) of the Data Protection Act 2018 "DPA18" defines direct marketing as "*the communication (by whatever means) of any advertising material which is directed to particular individuals*". This definition also applies for the purposes of PECR (see regulation 2(2) PECR and paragraphs 430 & 432(6) to Schedule 19 of the DPA18).
6. Consent in PECR is now defined, from 29 March 2019, by reference to the concept of consent in Regulation 2016/679 ("the GDPR"): regulation 8(2) of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019. Article 4(11) of the GDPR sets out the following definition: "*'consent' of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her*".
7. Recital 32 of the GDPR materially states that "*When the processing has multiple purposes, consent should be given for all of them*". Recital 42 materially provides that "*For consent to be informed, the data subject should be aware at least of the identity of the controller*". Recital 43 materially states that "*Consent is presumed not to be freely given if it does not allow separate consent to be given to different personal data processing operations despite it being appropriate in the individual case*".
8. "Individual" is defined in regulation 2(1) of PECR as "*a living individual and includes an unincorporated body of such individuals*".
9. A "subscriber" is defined in regulation 2(1) of PECR as "*a person who is a party to a contract with a provider of public electronic communications services for the supply of such services*".

10. "Electronic mail" is defined in regulation 2(1) of PECR as *"any text, voice, sound or image message sent over a public electronic communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient and includes messages sent using a short message service"*.
11. The term "soft opt-in" is used to describe the rule set out in in Regulation 22(3) of PECR. In essence, an organisation may be able to e-mail its existing customers even if they haven't specifically consented to electronic mail. The soft opt-in rule can only be relied upon by the organisation that collected the contact details.
12. Section 55A of the DPA (as applied to PECR cases by Schedule 1 to PECR, as variously amended) states:

"(1) The Commissioner may serve a person with a monetary penalty if the Commissioner is satisfied that –

(a) there has been a serious contravention of the requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003 by the person,

(b) subsection (2) or (3) applies.

(2) This subsection applies if the contravention was deliberate.

(3) This subsection applies if the person –

(a) knew or ought to have known that there was a risk that the contravention would occur, but

(b) failed to take reasonable steps to prevent the contravention."

13. The Commissioner has issued statutory guidance under section 55C (1) of the DPA about the issuing of monetary penalties that has been

published on the ICO's website. The Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010 prescribe that the amount of any penalty determined by the Commissioner must not exceed £500,000.

14. PECR were enacted to protect the individual's fundamental right to privacy in the electronic communications sector. PECR were subsequently amended and strengthened. The Commissioner will interpret PECR in a way which is consistent with the Regulations' overall aim of ensuring high levels of protection for individuals' privacy rights.
15. The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the DPA18: see paragraph 58(1) of Schedule 20 to the DPA18.

Background to the case

16. SportsDirect came to the attention of the Commissioner due to complaints reported via the ICO's online reporting tool. The Commissioner received twelve complaints about unsolicited communications between 21 December 2019 and 16 February 2020.
17. The Commissioner sent an initial investigation letter to SportsDirect on 25 February 2020 setting out her concerns regarding SportsDirect's compliance with PECR and asking for, inter alia, the source of its data, and evidence of the consent relied on in the course of its direct marketing campaign between 21 December 2019 and 16 February 2020.

18. SportsDirect provided a response on 13 March 2020. This response explained that all data used to engage in its direct marketing is obtained directly from customers; and provided details of the ways in which it obtained consent to engage in its direct marketing campaigns. In relation to the complaints which had been received, SportsDirect indicated that these recipients were part of a "re-engagement campaign", and stated:

"The ecommerce team determined that the data subjects in the aged data set had not unsubscribed from receiving email marketing and would only send emails with content that provided offers on multi-buy products or free delivery/click&collect, along with the usual unsubscribe link. This was done with the expectation that data subjects would either not engage with the email, choose to unsubscribe from future emails or view those offers and emails positively and engage with Sports Direct.

Where a data subject unsubscribed, this would be processed in the normal way, and where they did not engage with the emails after a reasonable period, the data would be removed from or anonymised within the marketing database.

Having considered the proposed approach and likely impact of the re-engagement campaign, the ecommerce team took the decision to run a re-engagement campaign with that aged data set with the objectives of (1) reducing the amount of data held in the marketing database and (2) connecting with customers who had not engaged with Sports Direct within the normal engagement criteria."

19. SportsDirect explained that "...the Sports Direct ecommerce team analysed the Sports Direct marketing database and identified a

category of data that showed as being opted in to receive email marketing but had not been sent any marketing emails." This category of data has been referred to as the 'aged data / aged dataset'.

20. Regarding evidence of consent, SportsDirect stated that "*none of the complainants were recorded as being opted out of marketing emails at the time their details were collected and had not unsubscribed to marketing emails at the time when the emails were sent*". It also provided a simple breakdown of the "lawful basis" relied upon for each complainant (i.e. soft opt-in; or consent).
21. The Commissioner sent further enquiries to SportsDirect on 2 April 2020, specifically seeking confirmation of the number of emails which were sent between 21 December 2019 and 16 February 2020, in addition to further information regarding the consent being relied upon and the frequency of the direct marketing emails being sent.
22. SportsDirect requested an extension of two months for its response in light of the impact of the COVID-19 pandemic, which the Commissioner agreed to.
23. SportsDirect responded on 12 June 2020 in line with the agreed extension period to provide answers to the Commissioner's most recent questions. Within this response it was confirmed that between 21 December 2019 and 16 February 2020 there were a total of 459,882,124 emails sent by SportsDirect, with 2,948,865 of those relating specifically to the "re-engagement campaign". SportsDirect provided percentages for the number of those sent messages which had been received by a subscriber; in relation to the "re-engagement campaign" it was explained that 87% were received, which the

Commissioner calculates equates to 2,565,513 direct marketing messages being received over the relevant period.

24. SportsDirect claimed to rely on the 'soft opt in' for seven of the twelve complainants, and stated that consent had been obtained from three of the twelve complainants directly. In terms of the two remaining complainants, SportsDirect claimed that its records did not show any messages being sent to one of them; and that the final complainant had since requested that their information be removed from its systems and so SportsDirect was unable to provide details of the lawful basis on which it would have relied to send the message.
25. The Commissioner took the view that sufficient evidence of valid consent had not been provided and sent an email to SportsDirect on 2 July 2020 to request this. SportsDirect requested an extension for providing this information which the Commissioner granted, although it was explained to SportsDirect that in the Commissioner's view such evidence should be readily available.
26. SportsDirect provided its response on 20 July 2020 with purported evidence of consent for three of the twelve complainants, specifically stating that those individuals had signed up to a 'local customer benefit scheme' (the "benefit scheme") at a store outside of the United Kingdom on 8 August 2011, 6 October 2012 and 24 April 2014 respectively. The purpose of the benefit scheme was to allow subscribers to "receive their receipts by email, a regular brochure, annual vouchers and other offers and promotions". This scheme ceased to operate in 2018.
27. The Commissioner sent further queries to SportsDirect on 14 August 2020 to establish why subscribers who signed up to the benefit scheme

continued to receive messages, and the number of customers who had consented to marketing communications in this way.

28. SportsDirect explained in response that “[f]ollowing cessation of the Scheme, the Scheme data set was reviewed and it was decided that (i) there was a legitimate interest in members of the Scheme continuing to receive general offers and discounts from the business as an alternative to the benefits previously made available under the Scheme and (ii) it would be prudent to run a data cleanse. This data cleanse removed duplicated data, incorrectly formatted email addresses and emails identified as ‘spam traps’. This left a data set of around 779,000 email contacts.

This reduced data set then received a small number of emails immediately following cessation of the Scheme, starting with a welcome-style email introducing the type of emails members would receive following cessation of the Scheme, unless they unsubscribed.”

29. The Commissioner asked further questions on 4 September 2020. In particular the Commissioner wished to know, inter alia, the specific date when the benefit scheme ended; the number of emails sent to, and received by, subscribers after the cessation of the scheme; and as part of the “re-engagement campaign”, how many subscribers were sent messages who had initially consented to marketing emails as part of a previous campaign.
30. In its response, SportsDirect again cited concerns which it had raised earlier in the investigation in respect of the challenges it has faced in gathering information to respond to some of the Commissioner’s queries; i.e. since many of the individuals who were “involved in making decisions and administering the databases around the time the dataset was cleansed have already long since left the business” [and]

"most files and communications created during their employment on local drives have long since been deleted in accordance with standard retention procedures".

31. SportsDirect therefore sought to provide its "best estimate" of the dates in connection with the cessation of the benefit scheme, stating that it ceased to operate "in around January 2018", and that throughout January and February 2018 the data cleanse took place, leaving "around 779,000 email contacts". This dataset was then sent a "welcome-style email" although the content of this could not be determined. Those who "engaged" with the "welcome-style email" were added to the "main email marketing dataset".
32. In relation to the "re-engagement campaign" (also referred to by SportsDirect as the "Christmas 2019 Email Campaign"), SportsDirect stated: *"one of the objectives of the Christmas 2019 Email Campaign was to cleanse the marketing database. This cleanse began in the week commencing 13 January 2020. This means that the business is not able to retrieve data deleted at that time and is unable to re-create that segmentation to provide [the Commissioner] with specific details around how many individuals initially consented to marketing emails as part of a previous campaign or scheme. The business used legitimate interests as the basis on which to send the Christmas 2019 Email Campaign."*

For the reasons described above, it is no longer possible for us to retrieve the distribution list used in the Christmas 2019 Email Campaign and then separate out individuals who were initially opted in through being a member of the Scheme"

33. The Commissioner sent an 'end of investigation' email to SportsDirect on 21 October 2020, although it was invited to provide any further "relevant evidence, or information regarding [its] policies, procedures and training programmes". SportsDirect responded on 2 November 2020 with a summary of its position, and information in respect of the number of individuals who may have received an email as part of the "re-engagement campaign", specifically stating that it: "*understand[s] that the volume of emails sent as part of the Christmas 2019 Campaign was approximately 2.9 million. [It] cannot quantify the total number of data subjects emailed as part of this campaign due to the absence of historic communications due to strict data deletion [...]. [...] the data subjects would have included individuals who had been members of the [Loyalty Scheme operating outside of the UK], but there would also have been other recipients*". Whilst SportsDirect were unable to confirm the precise number of individuals which it had emailed, its confirmation that "approximately 2.9 million" messages were sent accorded with the precise figures which it had provided on 12 June 2020 where it was stated that there had been 2,948,865 direct marketing messages sent relating specifically to the "re-engagement campaign", with 87% being received.
34. The Commissioner has made the above findings of fact on the balance of probabilities.
35. The Commissioner has considered whether those facts constitute a contravention of regulation 22 of PECR by SportsDirect and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

36. The Commissioner finds that SportsDirect contravened regulation 22 of PECR.
37. The Commissioner finds that the contravention was as follows:
38. The Commissioner finds that between 21 December 2019 and 16 February 2020 there were 2,565,513 direct marketing emails received by subscribers. The Commissioner finds that SportsDirect transmitted those direct marketing messages, contrary to regulation 22 of PECR.
39. SportsDirect, as the sender of the direct marketing, is required to ensure that it is acting in compliance with the requirements of regulation 22 of PECR, and to ensure that valid consent to send those messages had been acquired.
40. SportsDirect has been unable to provide evidence of consent for the messages sent over the period of 21 December 2019 and 16 February 2020.
41. In this instance, in relation to the 2,565,513 direct marketing emails stated by SportsDirect on 12 June 2020 to have been received by subscribers over the relevant period, SportsDirect has been unable to provide evidence of valid consent. Indeed it is stated that it is no longer possible for SportsDirect to *"retrieve the distribution list used in the Christmas 2019 Email Campaign"*. In the circumstances the Commissioner is not satisfied that SportsDirect can avail itself to the soft opt-in exception provided at regulation 22(3) PECR.
42. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

43. The Commissioner is satisfied that the contravention identified above was serious. This is because between 21 December 2019 and 16 February 2020, a total of 2,565,513 direct marketing messages were received by subscribers having been sent by SportsDirect. These messages, which were sent as part of a “re-engagement campaign”, contained direct marketing material for which subscribers had not provided valid consent. Furthermore, since SportsDirect is now unable to retrieve the distribution list and is therefore unable to evidence how/when details were purportedly obtained, the Commissioner is satisfied that SportsDirect is unable to rely on the soft opt-in exemption.
44. The Commissioner is therefore satisfied that condition (a) from section 55A(1) DPA is met.

Deliberate or negligent contraventions

45. The Commissioner has considered whether the contravention identified above was deliberate.
46. The Commissioner does not consider that SportsDirect deliberately set out to contravene PECR in this instance.
47. The Commissioner has gone on to consider whether the contravention identified above was negligent. This consideration comprises two elements:
48. Firstly, she has considered whether SportsDirect knew or ought reasonably to have known that there was a risk that these

contraventions would occur. This is not a high bar and she is satisfied that this condition is met.

49. The Commissioner has published detailed guidance for those carrying out direct marketing explaining their legal obligations under PECR. This guidance gives clear advice regarding the requirements of consent for direct marketing and explains the circumstances under which organisations are able to carry out marketing over the phone, by text, by email, by post, or by fax. In particular it states that organisations can generally only send, or instigate, marketing messages to individuals if that person has specifically consented to receiving them. The guidance also provides a full explanation of the “soft opt-in” exemption and states that organisations “*should [...] make sure that they keep clear records of exactly what someone has consented to. In particular, they should record the date of consent, the method of consent, who obtained consent, and exactly what information was provided to the person consenting*”. SportsDirect has been unable to do this.
50. The Commissioner has published detailed guidance on consent under the GDPR. In case organisations remain unclear on their obligations, the ICO operates a telephone helpline. ICO communications about previous enforcement action where businesses have not complied with PECR are also readily available.
51. It is therefore reasonable to suppose that SportsDirect should have been aware of its responsibilities in this area.
52. Secondly, the Commissioner has gone on to consider whether SportsDirect failed to take reasonable steps to prevent the contraventions. Again, she is satisfied that this condition is met.

53. The Commissioner takes the view that any person wishing to engage in direct marketing by electronic mail could and should – particularly since the coming into effect of the GDPR – have ensured that all of their consent capture mechanisms properly enabled consent to be separately given or withheld for direct marketing communications, and that such consent was retained. At the outset of the investigation the Commissioner raised concerns with SportsDirect's privacy policy which stated: *"You acknowledge that you do not object to us and third parties identified below, including our Third Party Advertisers, using your personal information for any of the purposes outlined in this privacy policy and you confirm that you do not and will not consider any of these purposes as a breach of any of your rights under the Privacy and Electronic Communications (EC Directive) Regulations 2003"* (emphasis added). SportsDirect has since amended the wording of its Privacy Policy.
54. The Commissioner takes the view that SportsDirect could legitimately have sought advice either from the Commissioner or from a legal advisor in relation to the basis on which it proposed to send its unsolicited direct marketing to an aged dataset but failed to do so. This is particularly egregious given that the purpose of SportsDirect's "re-engagement campaign" was to contact individuals with whom it had not "connected" with for some time.
55. In the circumstances, the Commissioner is satisfied that SportsDirect failed to take reasonable steps to prevent the contraventions.
56. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

57. The Commissioner has taken into account the following **aggravating feature** of this case:

- The Commissioner is concerned about SportsDirect's failure to maintain satisfactory internal consent records.

58. The Commissioner has taken into account the following **mitigating feature** of this case:

- The Commissioner is mindful that SportsDirect has taken a number of steps to improve its compliance with data protection legislation, specifically it has carried out an exercise to reduce the amount of data in its database; it has reconsidered the frequency of emails which will be sent to individuals; and will introduce a new cleansing system. It is noted that it has also updated its privacy policy in line with the Commissioner's guidance.

59. For the reasons explained above, the Commissioner is satisfied that the conditions from section 55A (1) DPA have been met in this case. She is also satisfied that the procedural rights under section 55B have been complied with.

60. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out her preliminary thinking. In reaching her final view, the Commissioner has taken into account the representations made by SportsDirect on this matter.

61. The Commissioner is accordingly entitled to issue a monetary penalty in this case.

62. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
63. The Commissioner has considered the likely impact of a monetary penalty on SportsDirect. She has decided on the information that is available to her, that SportsDirect has access to sufficient financial resources to pay the proposed monetary penalty without causing undue financial hardship.
64. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The sending of unsolicited direct marketing messages is a matter of significant public concern. A monetary penalty in this case should act as a general encouragement towards compliance with the law, or at least as a deterrent against non-compliance, on the part of all persons running businesses currently engaging in these practices. The issuing of a monetary penalty will reinforce the need for businesses to ensure that they are only messaging those who specifically consent to receive direct marketing.
65. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

66. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£70,000 (seventy thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

67. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **14 October 2021** at the latest. The monetary penalty is not kept by the Commissioner but will be paid into the Consolidated Fund which is the Government's general bank account at the Bank of England.
68. If the Commissioner receives full payment of the monetary penalty by **13 October 2021** the Commissioner will reduce the monetary penalty by 20% to **£56,000 (fifty-six thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
69. There is a right of appeal to the First-tier Tribunal (Information Rights) against:
- (a) the imposition of the monetary penalty and/or;
 - (b) the amount of the penalty specified in the monetary penalty notice.
70. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
71. Information about appeals is set out in Annex 1.
72. The Commissioner will not take action to enforce a monetary penalty unless:
- the period specified within the notice within which a monetary penalty must be paid has expired and all or any of the monetary penalty has not been paid;

- all relevant appeals against the monetary penalty notice and any variation of it have either been decided or withdrawn; and
- the period for appealing against the monetary penalty and any variation of it has expired.

73. In England, Wales and Northern Ireland, the monetary penalty is recoverable by Order of the County Court or the High Court. In Scotland, the monetary penalty can be enforced in the same manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.

Dated the 13th day of September 2021

Andy Curry
Head of Investigations
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

ANNEX 1

SECTION 55 A-E OF THE DATA PROTECTION ACT 1998

RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER

1. Section 55B(5) of the Data Protection Act 1998 gives any person upon whom a monetary penalty notice has been served a right of appeal to the First-tier Tribunal (Information Rights) (the 'Tribunal') against the notice.

2. If you decide to appeal and if the Tribunal considers:-

a) that the notice against which the appeal is brought is not in accordance with the law; or

b) to the extent that the notice involved an exercise of discretion by the Commissioner, that she ought to have exercised her discretion differently,

the Tribunal will allow the appeal or substitute such other decision as could have been made by the Commissioner. In any other case the Tribunal will dismiss the appeal.

3. You may bring an appeal by serving a notice of appeal on the Tribunal at the following address:

General Regulatory Chamber
HM Courts & Tribunals Service
PO Box 9300
Leicester
LE1 8DJ

Telephone: 0203 936 8963

Email: grc@justice.gov.uk

- a) The notice of appeal should be sent so it is received by the Tribunal within 28 days of the date of the notice.
 - b) If your notice of appeal is late the Tribunal will not admit it unless the Tribunal has extended the time for complying with this rule.
4. The notice of appeal should state:-
- a) your name and address/name and address of your representative (if any);
 - b) an address where documents may be sent or delivered to you;
 - c) the name and address of the Information Commissioner;
 - d) details of the decision to which the proceedings relate;
 - e) the result that you are seeking;
 - f) the grounds on which you rely;
 - g) you must provide with the notice of appeal a copy of the monetary penalty notice or variation notice;
 - h) if you have exceeded the time limit mentioned above the notice of appeal must include a request for an extension of time

and the reason why the notice of appeal was not provided in time.

5. Before deciding whether or not to appeal you may wish to consult your solicitor or another adviser. At the hearing of an appeal a party may conduct his case himself or may be represented by any person whom he may appoint for that purpose.

6. The statutory provisions concerning appeals to the First-tier Tribunal (Information Rights) are contained in section 55B(5) of, and Schedule 6 to, the Data Protection Act 1998, and Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (Statutory Instrument 2009 No. 1976 (L.20)).